LOH SIEW HONG v. PENDAFTAR MUALAF NEGERI PERLIS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID SALLEH J
[JUDICIAL REVIEW NO: WA-25-169-03-2022]
10 JULY 2023

Abstract – *In the event that a certificate of conversion to Islam could not be held as a conclusive proof of the facts as stated therein, if the 'force of the evidence' strongly suggests that a person is still practicing the religion of Islam, then that person shall continue to be held as a Muslim.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Challenge against unilateral conversion to Islam of minor children – Declaration that s. 117(b) of Perlis Administration of the Religion of Islam Enactment 2006 unconstitutional, null and void – Whether conversions illegal – Whether national language version of Federal Constitution authoritative – Whether certificate of conversion to Islam conclusive proof of facts stated therein – Whether 'force of the evidence' pointed to inevitable conclusion that children still practiced religion of Islam*

CONSTITUTIONAL LAW: *Legislation – Constitutionality – Perlis Administration of the Religion of Islam Enactment 2006 – Whether in contravention of art. 12(4) of Federal Constitution – Whether singular noun 'parent' denotes singular sense – Whether authoritative text of Federal Constitution is in national language – Whether translated text of national language proved as authoritative text – Whether translations prescribed under rt. 160B*

The applicant and one 'Nagahswaran' were married on 25 May 2008. Since the couple were a Hindu-Buddhist couple, the marriage was solemnised under the Law Reform (Marriage and Divorce) Act 1976. From the marriage, the couple were blessed with three children, *ie*, a pair of twin daughters, SA and SI, and a son, TM ('three children'). According to the applicant, at all material times, the three children were professing the Hindu religion. Nevertheless, on 7 July 2020, Nagahswaran and the three children went to the Islamic Religious Affairs Department, Perlis ('JAIPs') and converted to Islam. Their conversions were registered on the same date, and they were also issued with their respective certificates of conversion to Islam. After the couple were divorced pursuant to a Kuala Lumpur High Court order dated 23 September 2021, the applicant sought clarification regarding the validity of the conversions of the three children from the Registrar of Mualafs, Perlis ('first respondent'), since the conversions were made unilaterally, *ie*, with only the consent of Nagahswaran. Subsequently, the Majlis Agama Islam dan Adat Istiadat Melayu Perlis ('second respondent'), *vide* an email dated 4 March 2022, replied to the applicant. According to the second respondent, the conversions of the three children were not illegal

since: (i) their conversions had been consented to by the three children's lawful father, Nagahswaran; (ii) under the 2016-amended s. 117(b) of the Perlis Administration of the Religion of Islam Enactment 2006 ('2006 Perlis Enactment'), unilateral conversion (conversion with the consent of only one of the lawful parents) of children below the age of 18 is allowed; (iii) in converting the three children, the respondents had duly complied with all the necessary requirements under the law. Other than that, through a separate email dated 10 March 2022, the second respondent had also enclosed the certificates of conversion to Islam of the three children to the applicant. Aggrieved by the second respondent's reply, the applicant filed the present application for judicial review: (i) to challenge the conversions of the three children as null and void as they were made unilaterally, without the applicant's consent, as the three children's lawful mother; and (ii) to seek a declaration that the 2016-amended s. 117(b) of the 2006 Perlis Enactment is unconstitutional, null and void to the extent that it allows the unilateral conversion of children below the age of 18 ('application'). In determining the application, the court had, among others, considered the issues as raised by the respondents through the State Legal Advisor ('SLA'), *ie*, (i) the 2016-amended s. 117(b) of the 2006 Perlis Enactment is not unconstitutional for contravening art. 12(4) of the Federal Constitution ('FC'), as: (a) the word 'atau' in both the said s. 117(b) and the national language version of the said art. 12(4) denoted the meaning that only the consent of one of the lawful parents is required in matter pertaining to conversion of children below the age of 18 as either parents had the right to decide the religion of their children; and (b) the national language version of the Federal Constitution had been duly prescribed by the Yang di-Pertuan Agong ('YDPA'), thus, the national language version of the said art. 12(4), as per art. 160B of the FC, ought to be more authoritative than the English version of the same article; and (ii) since the three children had been issued with their respective certificates of conversion to Islam, there was a conclusive proof that the three children had converted to Islam. Further, the court also considered the application of the Federal Court cases of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* ('*Indira Gandhi*') and *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* ('*Rosliza*') and the Court of Appeal case of *Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah & Another Appeal* ('*Dahlia Dhaima*').

Held (dismissing application):

(1) The only evidence proffered by the SLA for the proposition that the national language version of the FC had been duly prescribed by the YDPA was the presence of the YDPA at the Majlis Pelancaran Perlembagaan Persekutuan Teks Bahasa Kebangsaan held on 29 September 2003. Surely the word 'prescription' referred to in art. 160B of the FC requires more than just physical presence of the YDPA in an official function. From the translated FC itself, there was

a caveat put on the first page that acknowledged that the said document had not yet been prescribed under art. 160B of the FC. Unless the national language version of the FC had been properly prescribed, no other ancillary 'evidence', including the speeches of Parliament as recorded in the *Hansard*, could change the translation into an authoritative text. For that reason, just as it was in *Indira Gandhi*, the court would proceed in determining the application on the basis that the English version of the FC was authoritative. (paras 31-34)

(2) There was no dispute that the certificates of conversion to Islam had been issued to the three children. The said certificates were issued after the first respondent was satisfied that the legal requirements under s. 107(1) of the Perlis 2006 Enactment had been adhered to. In para. 15 of affidavit in reply in encl. 19, the first respondent affirmed that the three children had uttered the two clauses of affirmation of faith. Therefore, for the present application, as in the case of *Dahlia Dhaima*, the certificates of conversion of Islam of the three children were held to be the conclusive proof of the facts as stated in the said certificates within the meaning of s. 112 of the Perlis 2006 Enactment. (paras 43-46)

(3) As per En Mohd Nazim's (the second respondent's CEO) affirmative assertion in para. 42 of affidavit in reply in encl. 18, the three children were still performing the daily Subuh prayers even after they were under the applicant's custody. This assertion had never been denied by the applicant. Even if it was assumed that the news report which formed the basis of En Mohd Nazim's conclusion was hearsay, his assertion that the three children still performed the Subuh prayers remained uncontradicted. Thus, even if the certificates of conversion to Islam were not conclusive proof in view of their unilateral nature, and therefore invalid, the 'force of the evidence' would suggest and pointed to the inevitable conclusion that the three children continued practicing the religion of Islam within the context of *Rosliza* case. Hence, considering that there was no evidence that the three children had reverted to the Hindu religion, and that the welfare of the three children within the meaning of *Indira Gandhi* case dictated that the *status quo* should remain, the application was dismissed without costs in view of public interest. (paras 49-51, 54-61 & 66)

Case(s) referred to:

Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd [2021] 4 CLJ 348 FC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(foll)***

Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah & Another Appeal [2023] 2 CLJ 513 CA ***(foll)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

A *Pendaftar Muallaf Wilayah Persekutuan v. LCY & Ors And Another Appeal [2021] 1 LNS 2079 CA* ***(refd)***
Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301 FC ***(foll)***
Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] 1 LNS 177 HC ***(refd)***

B **Legislation referred to:**
Administration of Islamic Law Enactment 1989, s. 74(3)
Administration of Muslim Law Enactment 1952, s. 147
Administration of the Religion of Islam (Amendment) Enactment 2016, s. 7
Administration of the Religion of Islam Enactment 2006, ss. 112(2), 107(1), 117(b)
Federal Constitution, arts. 12(4), 160B, Eleventh Schedule
C Guardianship of Infants Act 1961, ss. 5, 11

For the applicant - Srimurugan Alagan, Shamsher Singh Thind, Gunamalar Joorindajn & Thian Yee Chin; M/s Srimurugan & Co
For the 1st, 3rd, 4th respondents - Liyana Muhammad Fuad; FC
Mohd Radhi Abas; SLA, Perlis
D *Ainul Wardah Shahidan; SFC*
For the 2nd respondent - Haniff Khatri, Zainul Rijal Abu Bakar, Aidil Khalid, Muhammad Hariz Md Yusoff & Danial Farhan Zainul Rijal; M/s Chambers Zainul Rijal

Reported by Syamim Ariffin

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JUDGMENT

Wan Ahmad Farid Salleh J:

[1] The factual background that led to this application for judicial review
F can be summarised as follows.

[2] The applicant was married to one Nagahswaran a/l Muniandy ("Nagahswaran") on 25 May 2008. The marriage was solemnised under the Law Reform (Marriage and Divorce) Act 1976 at the office of Persatuan Penganut Dewa Sri Maha Mariamman, Kuala Muda, Kedah.

G **[3]** The marriage was blessed with two twin daughters, SA and SI, who were born on 7 November 2008 and a son, TM, who was born on 26 May 2011 ("the three children").

[4] According to the applicant, she professes the Hindu-Buddha religion.

H **[5]** In para. 5(5) of her affidavit in support of this application in encl. 3 ("AIS-3"), the applicant affirmed that at all material times, the three children profess the religion of Hindu and never converted to Islam. In any event, the conversion to Islam, if at all, was without her consent as their mother. It states as follows:

I > Ketiga-tiga anak saya, sejak lahir hingga sekarang, ialah penganut-penganut agama Hindu. Mereka tidak pernah memeluk agama Islam, dan, walau apa pun, mereka tidak mempunyai keupayaan untuk memeluk agama Islam tanpa keizinan saya.

[6] Nagahswaran converted to Islam on 7 July 2020. He registered his conversion at the Islamic Religious Affairs Department, Perlis ("JAIPs"). According to Nagahswaran in his affidavit in encl. 21 ("AIR-21"), which was filed by the Perlis State Legal Advisor's Office on behalf of the first, third and fourth respondents, he was persuaded to convert to Islam by his three children, which he agreed, after discussing with his friend, one Encik Abdul Khadir. It was Encik Abdul Khadir who brought him and the three children to JAIPs on 7 July 2020.

[7] In the meantime, Nagahswaran was detained at the Pusat Pemulihan Akhlak Machang under the Dangerous Drugs (Special Preventive Measures) Act 1985 on 21 September 2020. He was, however, released pursuant to an order made by the Federal Court dated 7 September 2022.

[8] The applicant and Nagahswaran were divorced pursuant to a Kuala Lumpur High Court order dated 23 September 2021. The High Court order, *inter alia* states as follows:

> ... Maka Adalah Dengan Ini Diperakui bahawa Dekri tersebut telah pada 22 September 2021 dijadikan muktamad dan mutlak dan bahawa perkahwinan tersebut adalah dengan ini dibubarkan.

[9] The applicant, through her solicitors, sought clarification from first respondent, the Registrar of Mualafs, Perlis, on the status of the alleged conversion to Islam of the three children since it was made without the applicant's consent as their lawful mother.

[10] The second respondent replied through a letter dated 18 February 2022, which was sent through an email dated 4 March 2022 ("the impugned email") confirming that the conversion of the three children was made with the consent of their lawful father, Nagahswaran. The second respondent quoted s. 117(b) of the Perlis Administration of the Religion of Islam Enactment 2006 ("the Perlis 2006 Enactment"). According to the letter, the Perlis Administration of the Religion of Islam (Amendment) Enactment 2016 ("the 2016 Amendment") allows unilateral consent of either a mother or father for the conversion of children under 18 years old to Islam.

[11] The letter (and the impugned email) also reaffirmed the first and second respondents' position that all the necessary procedures were adhered to and that the conversion of the three children was consented to by Nagahswaran. The letter states *inter alia* as follows:

> Oleh yang demikian, pihak MAIPs dan juga Pendaftar Muallaf teguh dengan pendirian bahawasanya, pengislaman ketiga-tiga anak tersebut hanya perlu mendapat keizinan salah seorang daripada ibu atau bapa atau penjaganya dan dalam kes ini, si bapa iaitu Nagahswaran a/l Muniandy telah memberikan keizinan terhadap pengislaman mereka menurut undang-undang telahpun disempurnakan mengikut Hukum Syarak dan Undang-Undang.

[12] On 10 March 2022, the solicitors acting for the applicant received another email from the second respondent, Majlis Agama Islam dan Adat Istiadat Melayu Perlis. In the email, the second respondent enclosed the certificates of conversion to Islam of the three children purportedly made on 7 July 2020 at the Jabatan Hal Ehwal Agama Islam Perlis.

[13] The certificates of conversion are exhibited in AIS-3 and marked as P-4. One of the certificates states as follows:

> Diakui bahawa [SA] No. Kad Pengenalan/Passport: xxxxx-02-0608 telah memeluk Agama Islam dan mendaftarkan pengislaman beliau di Jabatan Hal Ehwal Agama Islam Perlis (JAIPs) pada 7 Julai 2020. Beliau telah memilih nama Islamnya sebagai [SA].

[14] The three children were at the first respondent's office on 7 July 2020 with their father, Nagahswaran. According to the first respondent in his affidavit in reply in encl. 19 ("AIR-19"), the children's father had consented for them to convert to Islam. In para. 14 of AIS-19, the first respondent stated as follows:

> Saya juga mendapati ketiga-tiga kanak-kanak tersebut hadir bersama bapa mereka iaitu Nagahswaran a/l Muniandy [No KP 87XXXX-02-XXX] yang memberikan keizinan untuk ketiga-tiga kanak-kanak tersebut memeluk agama Islam di pejabat saya.

[15] The purported conversion of the three children was registered by the Registrar of Mualafs, Perlis, on 7 July 2020.

[16] Aggrieved, the applicant filed this application for judicial review seeking to challenge the unilateral conversion without her consent of the three children to Islam as null and void.

[17] The applicant also seeks a declaration that the amended s. 117(b) of the Perlis 2006 Enactment is unconstitutional and therefore, null and void to the extent that it allows unilateral consent of either a mother or father or the guardian for the conversion of children under 18 years old to Islam.

[18] Leave for the application was granted by this court on 1 August 2022.

The Case For The Applicant

[19] Before me, learned counsel for the applicant submitted that it is not in dispute that the three children were converted to Islam unilaterally. In the circumstances, according to learned counsel, what is left to be determined by this court in this application for judicial review is the legal status of such conversion.

[20] The applicant's case is anchored on the unilateral conversion of the three children, being minors at the material time, which according to the applicant, is illegal. The extension of the argument is that since the purported conversion was of no legal effect, the three children remain Hindus. My

attention was then drawn to the judgment of the Federal Court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145.

[21] *Indira Gandhi* carries the proposition that based on a purposive interpretation of art. 12(4) read with the Eleventh Schedule of the Federal Constitution, and on an application of ss. 5 and 11 of the Guardianship of Infants Act 1961 ("GIA"), the consent of both parents is required before a certificate of conversion to Islam can be issued in respect of the children.

[22] The proposition in *Indira Gandhi* was reiterated by the Court of Appeal in *Pendaftar Muallaf Wilayah Persekutuan v. LCY & Ors And Another Appeal* [2021] 1 LNS 2079; [2022] 2 MLRA 167. Nordin Hassan JCA (now FCJ), in delivering the judgment of the court after referring to a line of authorities, underlined the importance of adherence to the doctrine of *stare decisis* – binding judicial precedent – which has become the cornerstone of the common law practiced in this country.

[23] On the aforesaid authorities, learned counsel for the applicant urged this court to conclude that the unilateral conversion of the three children is illegal. In the circumstances, the certificates of conversion issued by the first respondent in exh. P-4 in AIS-3 ought to be cancelled *ab initio*.

The Response From The State Legal Advisor

[24] Learned State Legal Advisor ("State LA"), in urging this court to dismiss the application for judicial review, referred me to s. 117 of the Perlis 2006 Enactment as amended by the 2016 Amendment. For clarity, both the original version and the amended provision are reproduced here:

> 117 Capacity to convert to the religion of Islam.
>
> For the purpose of this Part, a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and:
>
> (a) has attained the age of eighteen years; or
>
> (b) if he has not attained the age of eighteen years, his parent or guardian consents to his conversion.

Section 7 of the 2016 Amendment provides as follows:

> 7 Amendment of section 117
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> Subsection 117(b) of the principal Enactment is amended in the Bahasa Malaysia language text by substituting for the word "ibu dan bapa" the word "ibu atau bapa".

[25] After the 2016 Amendment, the new s. 117 of the Perlis 2006 Enactment shall read as follows:

> 117 Keupayaan untuk memeluk agama Islam
>
> Bagi maksud Bahagian ini, seseorang yang tidak beragama Islam boleh memeluk agama Islam jika dia sempurna akal dan:

A (a) sudah mencapai umur lapan belas tahun; atau

(b) jika dia belum mencapai umur lapan belas tahun, ibu atau bapa atau penjaganya mengizinkan pemelukan agama Islam olehnya.

[26] Based on the aforesaid provisions, learned State LA submitted as follows:

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(i) the first respondent was satisfied that the conversion of the three children adhered to the legal requirements provided under s. 107(1) of the Perlis 2006 Enactment. This can be seen in para. 16 of the first respondent's affidavit in reply in encl. 19 ("AIR-19"). Under s. 107(1), the legal requirements are:

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(a) the person must utter in reasonably intelligible Arabic the two clauses of the affirmation of faith;

(b) at the time of uttering the two clauses of the affirmation of faith the person must be aware that they mean "I bear witness that there is no God but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah"; and

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(c) the utterance must be made of the person's own free will.

(ii) in doing what he did in registering the conversion of the three children after obtaining their father's consent, learned State LA submitted that the first respondent was exercising a statutory function as a public authority under the Perlis 2006 Enactment. In short, according to learned State LA, the first respondent was doing a lawful act;

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(iii) once the certificates of conversion had been issued, known as Akuan-Akuan Memeluk Agama Islam, then under s. 112(2) of the Perlis 2006 Enactment, they shall be conclusive proof of the facts stated in the certificates;

(iv) learned State LA further submitted that under the law applicable in Perlis, the consent of the mother is, in the instant case, the applicant, not necessary in view of the word "atau" in the amended s. 117(b) of the Perlis 2006 Enactment.

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Whether Section 117(b) Of The 2006 Enactment Is Constitutional

[27] The pertinent question discussed in *Indira Gandhi* and relied on by learned counsel for the applicant is whether s. 117(b) of the Perlis 2006 Enactment contravenes art. 12(4) of the Federal Constitution. Article 12(4) provides as follows:

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> For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

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Despite the clear *ratio* that can be distilled from *Indira Gandhi*, learned State LA made a spirited attempt to convince me that art. 12(4) employs the singular noun "parent" instead of the plural "parents" and therefore denotes a singular sense. "Parent", according to learned State LA, means either father or mother. It follows that either the father or mother has the right to convert the child to Islam, as the case may be.

[28] With respect, this line of argument has been addressed extensively by the Federal Court in *Indira Gandhi*. Zainun Ali FCJ, in delivering the judgment of the apex court remarked that the provisions of the Constitution are not to be interpreted literally or pedantically.

[29] It is against this backdrop that the Federal Court went on to hold that where a decision of such significance as the conversion of a child is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought. The contrary approach of allowing the child to be converted on the consent of only one parent would give rise to practical conundrums.

[30] Secondly, learned State LA invited me to conclude that the authoritative text of the Federal Constitution is in the national language, which gives a different meaning and connotation to art. 12(4). It says as follows:

> Bagi maksud Fasal (3) agama seseorang yang di bawah umur lapan belas tahun hendaklah ditetapkan oleh ibu atau bapanya atau penjaganya.

The word atau in the national language version of the Federal Constitution indicates that the religion of the child can either be decided by the father or the mother.

[31] This issue, too, was addressed by the Federal Court in *Indira Gandhi*. Central to the argument is art. 160B of the Federal Constitution, which provides that:

> 160B Authoritative text
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> Where this Constitution has been translated into the national language, the Yang di-Pertuan Agong may prescribe such national language text to be authoritative, and thereafter if there is any conflict or disagreeing between such national language text and the English language text of this Constitution, the national language text shall prevail over the English language text.

Learned State LA took pains to narrate the historical perspective and submitted that the national language text of the Federal Constitution, which according to him, was duly prescribed by the Yang di-Pertuan Agong. The only evidence proffered by learned State LA is the presence of the Yang di-Pertuan Agong at the Majlis Pelancaran Perlembagaan Persekutuan Teks Bahasa Kebangsaan which was held on 29 September 2003.

[32] I find difficulty in acceding to this line of submission. Surely, the "prescription" referred to in art. 160B of the Federal Constitution is more than the physical presence of the Yang di-Pertuan Agong in an official function. The translation is not an authoritative text of the national language. I can say this with confidence and certainty because the first page of the reprint puts a caveat in the following words:

> Teks ini Hanyalah Terjemahan oleh Jabatan Peguam Negara bagi Federal Constitution. Melainkan jika dan sehingga ditetapkan sahih di bawah Perkara 160B Perlembagaan Persekutuan, teks ini bukan perundangan.

[33] Even the text itself acknowledged that the translation has yet to be prescribed under art. 160B. In the circumstances, unless the national language of the Federal Constitution is properly prescribed, no other ancillary "evidence" including the speeches in Parliament as recorded by Hansard, as alluded to by learned State LA, can change the translation into an authoritative text.

[34] Just as in *Indira Gandhi*, I will proceed on the basis that the English version of the Federal Constitution is authoritative.

Post *Indira Gandhi*

[35] The Court of Appeal in the recent judgment in *Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah & Another Appeal* [2023] 2 CLJ 513, has given new impetus and opened new horizons and dynamics in this area of law. In that case, the respondent was born in 1986 to non-Muslim parents; her father was a Hindu, while her mother was originally a Buddhist. Following her parents' separation in 1991, the respondent lived with her mother. The respondent's mother visited Jabatan Agama Islam Selangor ('JAIS')/Pertubuhan Kebajikan Islam Malaysia ('PERKIM') to convert to the religion of Islam to marry a Muslim man. After the conversion, both mother and daughter, who was five at the material time, were issued with conversion cards by JAIS. Based on the card issued by JAIS on 28 August 1993, the respondent had been converted on 17 May 1991. This was done without the consent of the respondent's father.

[36] In 2013, the respondent, by then aged 27, filed a summons at the Syariah High Court against Majlis Agama Islam Wilayah Persekutuan ("MAIWP") ("MAIWP summons") for a declaration that she was no longer a Muslim, highlighting, *inter alia*, that she never professed the religion of Islam. The Syariah High Court dismissed the MAIWP summons and the respondent's appeal to the Syariah Court of Appeal was unsuccessful.

[37] The respondent then commenced originating summons ('OS') at the High Court against the appellants, seeking a declaration that she was not a person professing the religion of Islam. The High Court allowed the OS and granted the declaration sought by the respondent on the grounds that *inter alia*

that the conversion of the respondent, when she was a minor, was in contravention of s. 147 of the Selangor Administration of Muslim Law Enactment 1952. A

[38] Aggrieved, the appellant appealed to the Court of Appeal.

[39] The Court of Appeal, by a majority, allowed the appeal from Majlis Agama Islam Selangor. The Court of Appeal took cognisance of the factual matrix that: B

(i) during proceedings at the Syariah Court, the respondent admitted that she practised praying and fasting and attended Islamic religious classes and ceremonies while staying with her Muslim convert mother and Malay Muslim stepfather. C

(ii) in the circumstances, the finding of the High Court that the respondent had never been a Muslim was erroneous.

(iii) the respondent's religious status, having already been determined by the Syariah High Court and the Syariah Court of Appeal, meant that the OS at the High Court was *res judicata* and potentially an abuse of court. Since her status as a Muslim had already been determined by the Syariah Courts, the respondent had no *locus standi* to re-litigate a similar application before the High Court by way of the OS. D E

[40] Mohd Nazlan JCA (with whom Yaacob Md Sam JCA concurred) took cognisance that JAIS had subsequently, on 28 August 1993, by which time the Administration of Islamic Law Enactment 1989 ("1989 Enactment") had come into force, issued a conversion card to the respondent upon the registration of her conversion. According to the majority of the Court of Appeal, this attracted the application of s. 74(3) of the 1989 Enactment, which provided that a certificate of conversion to Islam shall be conclusive proof of the facts stated therein. F

[41] In other words, the conversion was valid.

[42] Mohd Nazlan JCA further held as follows: G

> [74] We have however determined to the opposite effect in that pursuant to s. 74(3) of the 1989 Enactment the conversion was not invalid. But for argument sake – even assuming it was not valid, the question then arises – whether this would be a complete answer to the constitutional identity issue – that she was therefore not one who had ever professed the religion of Islam if the conversion was invalid? The High Court was of the said conclusion. H
>
> [75] The answer, in our view, is however in the negative. The reason is that as stated in *Rosliza*, the entire factual matrix of the case must be examined for proof of affirmative profession of the religion by the respondent at the material time. And it bears emphasis this does not concern one's faith but instead one's identity under the Federal I

Constitution. A Muslim by identification would be legally identified as a "person professing the religion of Islam" regardless of whether he or she practises the religion or not.

[43] Coming back to the facts of the instant case, there is no dispute that the certificates of conversion were issued to the three children. The certificates were issued after the first respondent was satisfied that the legal requirements under s. 107(1) of the Perlis 2006 Enactment were adhered to. In para. 15 of AIR-19, the first respondent affirmed as follows:

> 15. Saya selanjutnya menyatakan bahawa ketiga-tiga kanak-kanak tersebut telah mengucap dua kalimah Syahadah di pejabat saya dengan kerelaan mereka sendiri.

[44] What is interesting in *Dahlia Dhaima* is the respondent:

(i) who was five at the material time, did not utter the requisite affirmation of faith, the kalimah syahadah, yet a conversion card was issued to her by JAIS.

(ii) the issuance of the card was made without the consent of the respondent's father.

Based on this factual narrative, the majority of the Court of Appeal, *inter alia*, relying on s. 74(3) of the 1989 Enactment, held that a certificate of conversion to Islam should be conclusive proof of the facts stated therein.

[45] Section 112 of the Perlis 2006 Enactment provides as follows:

> Section 112, Certificate of Conversion to the Religion of Islam.
>
> (1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.
>
> (2) A Certificate of Conversation to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

[46] For reasons to be stated hereinafter, I hold that the certificates of conversion issued by the first respondent in this case, as seen in exh. P-4, are conclusive proof of the facts stated in the certificate.

Analysis And Findings

[47] Even if I am wrong in the view that I have just expressed and in applying *Dahlia Dhamia*, I will now analyse the implication of another judgment of the Federal Court in *Rosliza Ibrahim v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 301.

[48] In *Rosliza*, the majority of the Federal Court held that the civil courts had the jurisdiction to determine the status of persons who claimed they "were never Muslims" as opposed to "no longer Muslims". In the former,

the question was whether a person was, in the first place, one who professed the religion of Islam; it was a question regarding one's identity under the Federal Constitution which, in turn, necessitated constitutional interpretation and therefore the civil courts were empowered, indeed duty-bound, to adjudicate the matter even if there were religious connotations attached to it. The majority of the Federal Court further held that determining whether *Rosliza* was constitutionally a person who "professed the religion of Islam" required proof. The force of the evidence in that case suggested the contrary.

[49] *Rosliza* referred to "the force of the evidence" in determining whether one professes the religion of Islam. What is the force of the evidence in this case? The second respondent filed an affidavit in reply in encl. 18 through Mohd Nazim bin Haji Mohd Noor ("AIR-18"). Encik Mohd Nazim is the CEO of the second respondent. In para. 42 of AIR-18, Encik Mohd Nazim affirmed as follows:

> Seterusnya, saya juga mengatakan bahawa kanak-kanak tersebut telah menzahirkan iktikad dan keazaman melalui perbuatan dan tingkah lakunya untuk terus berada dalam agama Islam, apabila sehari selepas daripada perintah Mahkamah Tinggi Kuala Lumpur yang mengisukan writ *Habeas Corpus* dirujuk dalam perenggan 22 di atas, dan ketika berada di dalam kawalan dan jagaan penuh Pemohon, pada 22 Februari 2022, Kanak-Kanak tersebut masih lagi mengamalkan ajaran Islam, menunaikan solat Subuh, bahkan salah seorangnya dilaporkan bercita-cita apabila sudah dewasa kelak untuk menjadi Peguam Syarie.

[50] In response, the applicant denied this in para. 31 of her further affidavit encl. 23 ("AIS-23"). It was a bare denial. After having obtained custody of the child pursuant to the *habeas corpus* order, the three children stayed with the applicant. However, the applicant did not deny the affirmative assertion that the three children continued professing the religion of Islam in performing the daily Subuh prayers when they were in her custody.

[51] Even if we assume for one moment that the news report, which formed the basis of Encik Mohd Nazim's conclusion, is hearsay, his assertion that the three children continued performing the Subuh prayers remained uncontradicted. The applicant should have denied categorically that the three children ever performed the prayers when they were in her custody.

[52] The law is that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted; *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281.

[53] The same proposition can be seen in the recent judgment of the Federal Court in *Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd* [2021] 4 CLJ 348; [2021] 3 MLJ 159 where Abdul Rahman Sebli FCJ (now CJ (Sabah & Sarawak) remarked as follows:

> Therefore, the respondent's failure to contradict the appellants' assertions that they did not receive the writ must be taken as an admission of the fact so asserted: see *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; [1986] CLJ (Rep) 45 ('*Alloy Automotive*') which the Court of Appeal applied in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 MLJ 281; [1995] 1 CLJ 609.

[54] So, even if the certificates of conversion are not conclusive proof in view of its unilateral nature, and therefore invalid, the "force of the evidence" would suggest that the three children continued professing the religion of Islam in the context of *Rosliza* and I so hold.

[55] One could only be a Muslim for him or her to perform the obligatory prayers.

[56] There lies the answer to the "constitutional identity" issue alluded to in *Rosliza*. As alluded to earlier, determining whether the three children in this case are constitutionally persons who "professed the religion of Islam" required proof. As I indicated, the "force of evidence" in this case points to the inevitable conclusion that the three children are practising the religion of Islam.

[57] For the avoidance of doubt, I am not departing from *Indira Gandhi*. On the contrary, I am applying *Indira Gandhi* as refined by *Rosliza*.

[58] There is no evidence before me that the three children have reverted to the Hindu religion.

[59] There is another aspect of *Indira Gandhi* that has been rarely discussed in subsequent reported cases. It is this. It concerns the welfare of the children that must take precedence. Zainun Ali FCJ observed that:

> What can be discerned from the above is that, the law has come a long way from the days when one parent's claim could be considered superior to the other. Where the child's religion or religious upbringing is in issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all the circumstances of the case.

[60] Having regard to all the circumstances of the case, there is no evidence before me that the three children are not happy staying with the applicant. Although this is another issue, it is quite related to the instant case. There is no evidence that the three children stopped professing the religion of Islam when they were under the care of the applicant either. Therefore, the welfare of the children, within the meaning of *Indira Gandhi*, dictates that the *status quo* should remain.

[61] For the aforesaid reasons, this application for judicial review is dismissed.

[62] One final note. I am fully aware that *Dahlia Dhaima*, being a recent Court of Appeal case, was not referred to and canvassed by the parties during submission.

[63] However, and for the avoidance of any doubt, my decision will remain the same even if no reference is made to *Dahlia Dhaima*.

[64] In any event, in *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] 1 LNS 177; [2017] MLRHU 144, the issue raised was whether there had been a breach of natural justice when the adjudicator referred to case law authorities not cited by the parties. Lee Swee Seng J (now JCA) raised his doubt even an appeal, where the merits of a decision can be delved into, one would be able to succeed on the ground that the trial judge referred to cases not cited by the parties. According to the learned judge, that would be to discourage further research and initiative by the judge, especially when, in some cases, research by counsel or the lack of it is so telling that the trial judge could not write a "proper speaking judgment of substance and coherence".

[65] Having said that, my grounds are essentially anchored on my understanding of the *ratio* in *Indira Gandhi* and *Rosliza*. As to *Indira Ghandi*, I paid attention to the welfare of the children hitherto ignored by many of the subsequent reported cases. On *Rosliza*, the learned Chief Justice employed the phrase the "force of the evidence" in "determining whether the plaintiff is constitutionally a person 'professing the religion of Islam'". As stated earlier, the force of evidence points to the inevitable conclusion that the three children never left the religion of Islam.

[66] In view of the public interest regarding the case, I shall make no order as to costs.